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QUESTION OF THE HUMAN RIGHTS OF ALL PERSONS SUBJECTED TO ANY FORM OF DETENTION OR IMPRISONMENT, IN PARTICULAR: QUESTION OF A DRAFT OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Written statement submitted by the American Association of Jurists, a non-governmental organization in consultative status (category II)

The Secretary-General has received the following communication, which is circulated in accordance with Economic and Social Council resolution 1296 (XLIV).

[4 February 1993]

DRAFT OPTIONAL PROTOCOL TO THE CONVENTION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT

Economic and Social Council resolution 1992/6 of 20 July 1992 authorized the establishment of a working group to elaborate a draft protocol.

Brief analysis of the basic elements of the draft

(a) Prevention and confidentiality mean effective protection

The draft goes further than existing mechanisms, in that States will undertake to authorize visits unconditionally and without reservation. The subcommittee established under the protocol (see arts. 2 to 7 of the draft) performs a preventive function. Its task is to carry out fact-finding missions and, in a spirit of cooperation (see also art. 3 of the draft) to

make recommendations for improving, if necessary, the protection of persons deprived of their liberty. Any such recommendations should be taken as a starting point for a dialogue leading to concrete measures.

Confidentiality is ensured throughout the mission. The subcommittee's recommendations, consultations and report (see art. 14 of the draft) will remain strictly confidential. No levelling of accusations or public criticism. The only exception would be if the State Party has failed to cooperate or refused to improve the situation, in which case the Committee against Torture (CAT) may, at the request of the subcommittee, decide to make a public statement or to publish the report (see art. 14, para. 2, of the draft). Such publication in the form of a sanction should serve to strengthen the spirit of cooperation underlying the protocol, without really creating an obstacle to ratification.

(b) Places of detention to be visited

Article 1 of the draft calls on every State Party "to permit visits ... to any place under its jurisdiction where persons deprived of their liberty by a public authority or at its instigation or with its consent or acquiescence are or may be held". The protocol is therefore applicable, for example, in places where persons are held in temporary detention, imprisoned after being found guilty of an offence, placed in administrative detention or confined for medical reasons, or to places where minors are detained by a public authority. It also applies to detention by military authorities.

The protocol applies only to persons detained by "a public authority" for the following reasons: under international law, State responsibility covers such situations only; the special case of insurrectional movements is in any event covered by the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of Non-international Armed Conflicts (Protocol II) of 8 June 1977; a process of dialogue such as that established, for the purpose of prevention, by the protocol could not be initiated without the "participation" of a public authority; finally, this provision of the draft would otherwise be too broad (it would cover, for example, any confinement of one individual by another) and would thus impose unlimited obligations on States (authorizing preventive visits even to private premises such as dwellings), and consequently would have a very low success rate and inevitably have to be amended.

The addition of the words "or at its instigation or with its consent or acquiescence" is justified by the situation of "disappeared" persons. Article 12, paragraph 2 (d), complements article 1, paragraph 1, in fine of the draft by establishing the obligation of the State party to provide assistance if the subcommittee or one of its delegations wishes to visit locations other than those selected by the public authorities (see art. 12, paras. 2 (b) and (c), of the draft). It was felt necessary to insert such a provision to enable the subcommittee to visit places where "disappeared" persons might be held.

Under article 12, paragraph 2 (e), of the draft, it is also possible to demand the production of "any person deprived of his liberty whom the delegation wishes to interview, at the request of the delegation and at a convenient location, i.e. if necessary outside the place of detention (this wording has also been inserted to enable States having secret places of detention still to ratify the protocol)". The concept underlying this paragraph is similar to that of habeas corpus or amparo. The main merit of this article is that it to some extent makes derogation from the above judicial guarantees impossible. They still belong to the category of rights that can be suspended when a state of emergency is proclaimed. The prohibition of torture, on the other hand, is a right which cannot be overridden and which must be observed under all circumstances. The effect of including a guarantee similar to that of habeas corpus or amparo in an additional protocol to a convention against torture is to render such guarantees indefeasible.

The draft protocol therefore not only forms part of the efforts currently being made by the United Nations to prevent enforced disappearances, but also is in keeping with the international community's expressed wish to have the rights of habeas corpus or amparo declared "an inalienable right".

The organization of a mission also is governed by article 12 of the draft. Before being authorized to visit at any time, the subcommittee must notify the Government concerned of its intention (see art. 12, para. 1, of the draft). This paragraph does not stipulate the interval which must elapse between notification and the time when the mission is carried out. A number of interests are involved. The subcommittee should allow the State concerned time to take the necessary measures (see art. 12, para. 2, of the draft) in order to make the mission as productive as possible (a specific application of the principle of cooperation as expressed in article 3 of the draft), but without enabling it to correct certain violations (with the passage of time, the marks left by any acts of torture disappear, places of detention can be cleaned up, prisoners transferred, etc.); nor should States be under semi-permanent notification and, if the situation so requires, the mission may be carried out immediately after notification. A proper balance should be found for each specific case.

Under article 13 of the draft, the State may, in the context of a mission and in very specific circumstances, postpone a visit or limit the subcommittee's right of access to a given place.

Article 12, paragraph 3, calls for very special attention. It stipulates that members of the delegation may interview any person deprived of his liberty in private, inside or outside his place of detention, without witnesses and for the time they deem necessary. They may also communicate without restriction with the relatives, friends, lawyers and doctors of persons who are, or have been, deprived of their liberty and with any other person or organization that they think may be able to provide them with relevant information. It is understood that this list is not exhaustive. Such persons are not obliged to agree to communicate with the subcommittee; nevertheless, the subcommittee must be able to ascertain that such is their wish. Article 12, paragraph 4, protects witnesses, "victims" and any other

cooperating person or organization from any sanction. Regrettably, the wording of this provision leaves something to be desired: a more specific reference to article 12, paragraph 3, would be advisable.

Article 14 of the draft concerns the preparation of a report by the subcommittee at the end of each mission. Thereupon, a dialogue is established with the State concerned with a view to cooperating in bringing about improvements in the protection of persons deprived of their liberty.

Article 15 of the draft stipulates that CAT will examine the reports and recommendations resulting from the various missions, while observing their confidentiality, subject to article 14, paragraphs 2 and 3, of the draft, and the general annual report prepared by the subcommittee on the implementation of the protocol.

The system of visits and its implementation therefore appear to be very well regulated.

(d) Risk of overlapping with other systems of visits?

The additional protocol deals cleverly with the risk of overlap with other systems of visits.

Article 8, paragraph 2, of the draft provides that the subcommittee shall postpone its mission if CAT is to carry out a visit under article 20, paragraph 3, of the Convention against Torture.

Article 9, paragraph 1, of the draft prevents the subcommittee from sending missions to countries which have ratified a regional convention providing for a system of visits (the European Convention for the prevention of torture is as yet the only concrete example). Cooperation is possible.

Article 9, paragraph 2, *in fine* provides for the activities of the subcommittee and ICRC in a given country in peacetime.

Cooperation and coordination, then, to avoid any situation which may place too many demands on States and to obtain the maximum number of accessions without sacrificing the effectiveness of prevention and protection.

Conclusion: the expression of a hope

The draft optional protocol to the Convention against Torture meets the need to monitor States' observance of their obligations regarding torture and inhuman or degrading treatment but, above all, applies the most advanced and effective monitoring system to those obligations. The existence of an international body of universal character to inspect places within the jurisdiction of States has much more far-reaching significance than a system based on the consideration of information submitted by the States themselves or the consideration of individual complaints. This system also has the advantage of providing not only a more effective method of ascertaining

whether a State is honouring its international obligations, but also a method of preventing, in a spirit of cooperation with States, any violations before they occur, or at least before they occur on a large scale. It is therefore consistent with the new approach to ensuring the protection of human rights.

The American Association of Jurists stresses the need to adopt the draft protocol rapidly so that the international community can begin to work actively on effective prevention and expresses the hope that this study may help to allay any misgivings.